No. 22297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

RALPH WILMOT, Counsel for the General Counsel of the National Labor Relations Board,

Appellant,

v.

DAVID DOYLE, National Labor Relations Board Trial Examiner on relation of LOCAL 959 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT, and GROCERS WHOLESALE, INC.,

Appellees,

and

RALPH WILMOT, in his individual capacity,

Intervenor,

---

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

# BRIEF FOR THE APPELLEES

Richard P. Donaldson, Esq.
James Hubbard, Esq.
Bassett, Donaldson & Hafer
2819 First Avenue
Seattle, Washington
Attorneys for Appellee
Teamsters Local 959

D. A. Burr, Esq.
Burr, Boney & Pease
825 W. Eighth Avenue
Anchorage, Alaska
Attorneys for Appellee
Grocers Wholesale, Inc.



FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

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## ADDITIONAL STATEMENT OF JURISDICTION

Appellees invoked the jurisdiction of the District Court under Section 11(2) of the National Labor Relations Act, as amended, 29 U.S.C. 161(2), and under 28 U.S.C. 1337 and 28 U.S.C. 1361, (as stated in appellants' Statement of Jurisdiction). Appellees also contend that the exercise of jurisdiction by the District Court is supported by 5 U.S.C. 552(a)(3) and 5 U.S.C. 555(d).

## ADDITIONAL STATEMENT OF THE CASE

### A. Supplement to Statement Concerning Proceedings Before the Board

The first two paragraphs of appellant's Statement of the

Case (appellant's brief, pp. 2-3) require amplication for they do not adequately recite the background facts giving rise to the controversy over appellant Wilmot's testimony. The following paragraphs should be substituted therefore:

Appellee Teamsters Union Local 959, of Anchorage, Alaska, and appellee Grocers Wholesale, Inc., an Alaska corporation, are respondents in a consolidated National Labor Relations Board unfair labor practice complaint proceeding (Cases No. 19-CB-1162; 1186; 1189 and 19-CA-3574). A hearing on the consolidated complaint was scheduled for June 20, 1967, at Anchorage, Alaska (R. 11).

On the designated date the attorneys for the parties, including Attorney Wilmot, appeared before the Trial Examiner assigned to hear the case and requested that the hearing not be convened pending certain settlement discussions then under way. The Trial Examiner granted the request of counsel and on the following day, June 21, 1967, a settlement on the pending charges was reached. Attorney Wilmot advised counsel for the appellees, after telephoning his Seattle office, that the settlements had been approved by the Acting Regional Director for the National Labor Relations Board's Nineteenth Regional Office. The Trial Examiner was then informed that settlements had been obtained and he left Anchorage without convening the hearing. On the same day, and subsequently, the terms of the settlement agreements were imple-

mented by the respondents (R. 12).1/

Under date of July 5, 1967, the Regional Director of the Nineteenth Regional Office advised the appellees that he was "unable to approve the settlement agreements" which were signed by the appellees on June 21, and he indicated that the hearing would be re-scheduled. September 12, 1967 was subsequently fixed as the new hearing date, later continued to October 4, 1967 (R. 12).

In contemplation of the re-scheduled hearing, counsel for appellee Local 959 obtained a subpoena duces tecum (No. 70429) from the Nineteenth Regional Office, duly executed by Board member Frank McCulloch, and carrying the seal of the Board. This subpoena was addressed to Attorney Wilmot and directed him to produce at the hearing before the Trial Examiner (1) the original settlement agreements negotiated and executed on June 21, 1967, and (2) a list of the telephone calls between himself and the Regional Office, on June 21, 1967, together with the identification of the persons with whom he communicated (R. 7).

Appellee Local 959 intended to prove, at the re-scheduled hearing, that the pending complaint has been previously settled. It was planned to establish this point through the testimony of Attorney Wilmot and the introduction of the subpoenaed items (R. 12). At the re-scheduled hearing

1/ Reference to the Record on Appeal are designated "R." References to that portion of the Record on Appeal which consist of the reporter's transcript of the proceedings before the District Court are designated "Tr."

appellee Grocers Wholesale joined with appellee Local 959 in the implementation of this strategy. (R.58).

After serving the subpoena on Wilmot, counsel for appellee Local 959 wrote to the General Counsel of the Board, pursuant to Board Rule 102.118, asking that the General Counsel give Wilmot permission to comply with the subpoena (R.14-15). On October 2, 1967, the General Counsel sent a telegraph denying this request (R.16).

The re-scheduled hearing was convened at 10:00 a.m. on October 4, 1967, in Anchorage, Alaska, by National Labor Relations Board Trial Examiner, David F. Doyle (R.25).

The remaining portions of appellant's statement of the case are accepted by appellees as an adequate description of the proceedings before the Trial Examiner and in the District Court.

B. Supplement to Statement Concerning Events Subsequent to Filing of Notice of Appeal

Appellant recites that subsequent to the lodging of the appeals in this matter, the Board entered an order overruling the Trial Examiner and revoking the subpoena (appellant's brief, pp. 8-9). It should be added that on March 13, 1968, appellant filed in this Court, a "Motion to Vacate Judgments of the District Court and to Remand Case with Instructions to Dismiss the Petition as Moot." This motion was based on the contention that the revocation of the subpoena rendered the appeals moot.

On March 28, 1968, the appellees filed an answer to appellant's motion.

On May 2, 1968, this Court entered an order denying

the motion.

## ARGUMENT

### I. THE ORDERS APPEALED FROM ARE NOT MOOT, AS HAS PREVIOUSLY BEEN DETERMINED BY THIS COURT

The mootness argument set forth in appellant's brief, (pp. 9-11), was separately presented to this Court by means of appellant's "Motion to Vacate Judgment of the District Court and to Remand Case with Instructions to Dismiss the Petition as Moot." On May 2, 1968, this Court denied appellant's motion.

The Court's action disposes of the mootness argument.2/

### II. THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION

#### A. Summary of Argument

The Administrative Procedure Act provides, in part, that a respondent involved in an administrative agency proceeding "is entitled to present...his defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the

2/ In addition to the arguments concerning mootness which were set forth in appellees' answer to appellant's motion, appellees would also call the court's attention to Flotill Products, Inc. v. Federal Trade Commission 278 F.2d 850 (9th Cir. 1960) wherein it was held that once a district court has entered an order enforcing an administrative agency subpoena, the subpoena itself becomes "inoperative and irrelevant." This would suggest that the subsequent revocation of such a subpoena would not, of itself, render the enforcement proceedings moot.

facts" (5 U.S.C. 556(f)).[3] This case involves the question of whether the equity jurisdiction of the United States district courts is available to secure the exercise of this right.

Appellees' primary defense to the unfail labor practice charges concerning which they were asked to stand trial on October 4, 1967, was that such charges had been lawfully and effectively settled and disposed of on June 21, 1967, on the occasion of the previously scheduled hearing.

The subpoena duces tecum issued to Wilmot was vital to the presentation of this defense. Appellees intended to introduce in evidence the original copies of the settlement agreements entered into on June 21, 1967, showing that they had been signed by the appellees, and by the charging parties, and they intended to introduce the oral testimony of Wilmot establishing that the settlement agreements had received the approval of the Acting Regional Director and that all parties concerned, including Wilmot, had understood that the pending charges had been satisfactorily and finally resolved.[4]

---

3/ Similarly, it is provided in Section 10(b) of the National Labor Relations Act that a person complained of shall have the right to appear in person or otherwise and to "give testimony" in his defense (29 U.S.C. 160(b).

4/ The transcript of the hearing before the Trial Examiner on October 6, 1967, contains a recitation of the particular information which appellees sought to elicit from Wilmot. See Transcript of Board hearing on 10/6/67, pp.60-73, attached to appellees' answer to motion to vacate.

When Wilmot refused to produce the requested documents, or to testify, appellees sought and obtained the assistance of the United States District Court for the District of Alaska.

Wilmot asserts that the jurisdiction of the District Court was wrongfully exercised, contending that the only statutes which gives a district court jurisdiction to enforce Board subpoenaes is Section 11(2) of the National Labor Relations Act, as amended, (29 U.S.C. 161(2)), and that such statute requires that enforcement proceedings be instituted "in the name of the Board." He states:

> "If the Board refuses to institute a subpena enforcement proceeding on relation of a private party, then that subpena cannot be enforced." (Appellant's brief, p. 12).

Biazevich v. Becker, 161 F.Supp. 261, 41 LRRM 2782 (D.C. S.D. Calif. 1958) and other district court opinions, all of which rely on Biazevich, are cited in support of this contention (appellant's brief, p. 11-12). In Biazevich, district judge Yankwich ruled that a respondent in an unfair labor practice proceeding cannot, by himself obtain court assistance concerning the enforcement of subpoenaes duces tecum issued to Board officials. His ruling rested on a literal reading of Section 11(2) of the National Labor Relations Act and upon his opinion that Section 11(2) could not be enlarged by anything in the subpoena provisions of the Administrative Procedure Act. He said:

> "Plaintiffs are not entitled by Section 11(2) of the Act to maintain this action. That Section permits district court enforcement of subpenas only upon suit of the Board, and not of a private party. If the Board declines to institute

an ex rel proceeding for the enforcement of a subpena issued at the request of a private party the propriety of this action can be reviewed under Sections 10(e) and (f) of the Act, as described in paragraph 1, above, and such action may not be made the basis for a private suit for injunction in the federal district court. This conclusion is not altered by Section 6(c) of the Administrative Procedure Act, which does not enlarge the Act's subpena enforcement procedures."

Judge Yankwich's analysis could be regarded as "dicta" for the particular subpoenaes which were at issue in the case were revoked before the Judge made his ruling and the rejection of jurisdiction could rest on this factor, and not on the limitations of Section 11(2).[5/] However, appellees hope to successfully demonstrate that regardless of the legal significance of Judge Yankwich's ruling, such ruling was erroneous and should not be followed here.

Appellees submit that under the circumstances of this case, the District Court was possessed of necessary jurisdiction to enforce the Wilmot subpoena. Such jurisdiction rests upon:

(1) The provisions of Section 11(2) of the National Labor Relations Act, (29 U.S.C. 161(2)). Various considerations support a broad construction of this Section including a review, in pari materia, of the provisions of Section 6 of the Administrative Procedure Act, (5 U.S.C. 555) and of the provisions of revised Section 3 of the

5/ As was said in the opinion, "The subpenas in question have been revoked by the Board, so that in any event there is nothing before the Court to enforce". The same situation prevailed in the other district court cases which have relied upon Biazevich.

Administrative Procedure Act (i.e., the Public Information Act; 5 U.S.C. 552), or

(2) The provisions of Section 1337 of the Judical Code (28 U.S.C. 1337), or

(3) The provisions of Section 1361 of the Judical Code (28 U.S.C. 1361).

A discussion of these provisions follows.

B. Jurisdiction Exists by Reason of Section 11(2) of the Act.

As Wilmot emphasizes, Section 11(2) of the Act (29 U.S.C. 161(2)) states that a United States district court shall have jurisdiction to issue orders enforcing Board subpoenaes "upon application by the board." However, Section 102.31(d) of the Board's Rules and Regulations recites that such applications will be instituted by the General Counsel rather than the Board. The Section reads:

> "Upon the failure of any person to comply with a subpena issued upon the request of a private party, the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpena would be inconsistent with law and with the policies of the act. Neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court."

It is clear from the record in the instant case that neither the Board, nor the General Counsel, would have applied to the District Court for enforcement of the Wilmont subpoena, even

f they had been requested to do so.[6/] It was the position of the eneral Counsel throughout the proceeding that Wilmot should not e required to testify and the Board apparently felt likewise, as s evident by its subsequent action in revoking the subpoena. ndeed, during the hearing in the District Court, Wilmot acknowl-dged, "Now, I agree that were applications to be sought, it would ost likely be denied, since I have been instructed not to tes-ify." (Tr. 14).

Thus, the question is whether a private litigant is free o initiate a proceeding for court enforcement of a subpoena in ircumstances where it is evident that neither the Board nor the eneral Counsel will undertake such responsibility. Section 11(2) s literally applied, as it was in Biazevich, supra, the answer ould be in the negative. But, "the literal reading of a statute s not necessarily the correct one. The policy and spirit of the aw must be heeded." Richmond F.&P.R. Co. v. Brooks, 197 F.2d 04 (D. C. Cir. 1952)

It is firmly established that in interpreting statutes he primary objective is to give effect to the intent of Congress

/ It is to be noted that there is no provision in the statute, or in the rule, specifying that a party must make a formal request to the Board or the General Counsel in order to initiate a subpoena enforcement proceeding. Assuming that such a procedure is implied, the making of a request to obtain court enforcement should be excused where it is obvious that the request would be denied. The law does not require the doing of useless acts and legislation should not be read in such a spirit. United States v. Big Bend Transit Co., 42 F.Supp. 459 (D.C. E.D. Wash. 1941). See also Seaboard Air Line Railroad Co. v. United States, 131 F.Supp. 129 (D.C. E.D. Va. 1954), and McLean v. Texas Co., 103 F.2d 989 (5th Cir. 1939)

and where a literal application of the words of the statute would lead to unjust, absurd or futile result, such an application is to be avoided. In such an instance, the language will be broadly construed consistent with the general purpose of the statute. "The reason of the law should prevail in such cases over its letter." United States v. Kirby, 7 Wall 482 at p.487, 19 L.ed 278 (1869). Also, United States v. American Trucking Association, 310 U. S. 534, 60 S. Ct. 1059 (1940) (and cases cited therein at p. 543); Lau Ow Bew v. United States, 144 U. S. 47, 12 S. Ct. 514 (1892); Consumers Union of the United States v. Walker, 145 F. 2d 33 (D. C. Cir. 1944); Miller v. Bank of America, 166 F. 2d 415 (9th Cir. 1948); Swan Island Club v. Yarbrough, 209 F. 2d 698 (4th Cir. 1954); Commonwealth of Virginia v. Cannon, 228 F. 2d 313 (4th Cir. 1955).

The following considerations justify a non-literal interpretation of Section 11(2), as applied to the facts of this case.

1. With reference to the enforcement of a subpoena issued to a private party, the requirement for an "application by the Board" is a matter of form and not of substance.

Neither the statute nor the rule requires the Board, or General Counsel, to actually prosecute the enforcement proceeding where a subpoena issued to a private party is involved. Quite to the contrary, the rule states the General Counsel will merely initiate the proceeding "on relation of [the] private party" and that neither the General Counsel nor the Board "shall be deemed to have assumed responsibility for the effective prosecution of

the same before the Court." (Bd. Rule 102.31(d)) Thus, the real parties in interest are the party at whose request the subpoena was issued and the person to whom it runs. In these circumstances, the statutory reference to the "application by the Board" is a matter of form and not of substance. "It is the substance, not the form, which should be our concern." United States v. New York, New Haven & Hartford Railroad Co., 355 U.S. 253, at p. 263, 78 S.Ct. 212 (1957).

In an effort to honor "form" appellees did caption the District Court pleadings in the name of the Trial Examiner, after securing his permission to do so.

2. A consideration of the purpose of the National Labor Relations Act supports a broad interpretation of the subpoena enforcement provisions of Section 11(2).

In their research, appellees uncovered no substantial policy arguments supporting a literal interpretation of Section 11(2), as applied to the enforcement of a subpoena issued to a private party. On the other hand, a consideration of the intent and purpose of the National Labor Relations Act, as amended, gives support to a broad interpretation. The Act has as its purpose the protection of commerce from industrial strife through the providing of "orderly and peaceful procedures for preventing the interference by either [employees or employers] with the legitimate rights of the other." (29 U.S.C. 141(b)).

The main "procedure" made available to accomplish the statutory purpose is that which concerns the prevention of unfair labor practices (29 U.S.C. 160). This procedure calls for the

resolution of unfair labor practices through the issuance of complaints and the holding of hearings. It is expressly provided that at such a hearing, a party proceeded against "shall have the right...to appear in person or otherwise and give testimony...." (29 U.S.C. 160(b). It is further provided that the hearing shall be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the "rules of civil procedure for the district courts," and that the Board shall make its determination" upon the preponderance of the testimony." (29 U.S.C. 160(b) and (c)).

Allowing private parties to petition for enforcement of subpoenaes is consistent with the purpose of the statute and the procedures which it established. Such an interpretation would protect the right of parties to "give testimony" supporting their positions, and would insure that all relevant and pertinent testimony and evidence would be before the Board, when the Board exercises its judicatory responsibilities. It would also facilitate "orderly" hearings by expediting the taking of testimony.7/

> "If possible the Act must be so construed as to make its various provisions workable. If the free flow of commerce is to be promoted under this Act, the operation and actions thereunder must be prompt. Undue and unnecessary delays in proceedings of the Board might well render such proceedings ineffecture and result in defeating the purposes of the Act." N.L.R.B. v. John S. Barnes Corp., 178 F.2d 156 (7th Cir. 1949).

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7/ If an application for enforcement cannot be filed by a private party, the only other remedy would be an appeal to the Court of Appeals pursuant to Section 10(A) of the Act (29 U.S.C. 160(A)). This is a lengthy and expensive procedure. See discussion, infra, p 22 .

Looking beyond the National Labor Relations Act for a moment it is also significant that Congress appears to have no uniform practice with respect to the drafting of subpoena enforcement provisions. While we did not have an opportunity to do a complete survey, we did note two statutes relating to government agencies having investigatory and adjudicatory functions, which expressly allow private parties to seek enforcement of agency subpoenaes.

Section 503(d)(1) of the Housing Act of 1954 provides, in part:

> "The [Federal Home Loan Bank Board] or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have the power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the board or any interested party may apply to the United States District Court where such hearing is designated for the enforcement of such subpoena or subpoena duces tecum and such court shall have power to order and require compliance therewith." (12 U.S.C. 1464(d)(1)) (emphasis added)

Similarly, Section 408(e) and (f) of the Federal Communications Act of 1934, as amended, state:

> "Subpenas; witnesses; production of documents; fees and mileage.
>
> "For the purpose of this chapter the [Federal Communications Commission] shall have the power to require by subpena the attendance and testimony of witnesses the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.
>
> "Designated place of hearing; aid in enforcement of orders.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section." (47 U.S.C. 409(e) and (f)) (emphasis added)

There would appear to be no sound reason why the Congress would deliberately permit a private party involved in Federal Communications Commission litigation to seek court enforcement of an agency subpoena and deny that right to a private party involved in National Labor Relations Board litigation. This circumstance militates strongly against a rigid interpretation of Section 11(2).

3. A consideration of the Administrative Procedure Act supports a broad interpretation of the subpoena enforcement provisions of Section 11(2).

Section 6(d) of the Administrative Procedure Act reads as follows:

"Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the supoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for the enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply." (5 U.S.C. 555(d)).

It is established that the foregoing provision is in pari materia with the specific statutes relating to the subpoena powers of the individual government agencies. Federal Maritime

v. New York Terminal Conference, 262 F.Supp. 225 (D.C. S.D. N.Y. 1966), affirmed 373 F.2d 424 (2nd Cir. 1967); Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 291 F.2d 354 (9th Cir. 1961); Long Beach Federal Savings and Loan Assoc. v. Federal Home Loan Bank Board, 189 F.Supp. 585 (D.C. S.D. Calif. 1960).[8/]

It has been so held with respect to the subpoena provisions contained in Section 11 of the National Labor Relations Act. NLRB v. International Typographical Union, 76 F.Supp. 895, 21 LRRM 2483 (D.C. S.D. N.Y. 1948). It was stated in this case that the subpoena provisions of the Administrative Procedure Act and the subpoena provisions of the National Labor Relations Act must be "read together."

Section 6(d) does not in any way limit or restrict the identification of the parties who may initiate subpoena enforcement proceedings. The statute recites that "on contest" the court shall sustain the subpoena if found to be in accordance with law and further, that "in a proceeding for enforcement," the court shall issue an order requiring compliance with the subpoena. The failure of Congress to specify which parties are privileged to initiate a proceeding for enforcement, or to distinguish in this regard between the enforcement rights of a government agency, and

8/ See also: Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949), cert. denied 338 U.S. 860; Shasta Minerals & Chemical Co. V. Securities and Exchange Commission, 328 F.2d 285 (10th Cir. 1964); Rafal v. Fleming, 171 F.Supp. 490 (D.C. E.D. Va. 1959); Tobin v. Banks & Rumbaugh, 201 F.2d 223 (5th Cir. 1953); Deering Milliken, Inc. v. Johnston, 193 F.Supp. 741 (D.C. N.C. 1961).

a private litigant, is a clear indication that Congress wanted no such limitation or differentiation imposed. Indeed, both the House and Senate reports concerning the Administrative Procedure Act expressly state that the general purpose of the subpoena provision was to insure that "private parties would have the same access to subpoenaes as that available to the representatives of agencies." Sen. Rep. 752, 79th Cong. 1st Sess; House Rep. 1980, 79th Cong. 2d Sess. (both reports are reproduced in Pike and Fischer, Administrative Law Dest Book)[9/]

If the provisions of Section 6(d) are read together with the provisions of Section 11(2) of the National Labor Relations act, and an effort is made to "harmonize" both statutes, it can only be concluded that Section 11(2) should be interpreted broadly to permit enforcement proceedings at the instance of a private party, at least in the circumstances revealed in this case.

Congressional policy in this area is also demonstrated by the amendments which were recently made to Section 3 of the Administrative Procedure Act by the terms of the Public Information Act of 1966. These amendments have been codified in 5 U.S.C. 552.

The basic purpose of the recent amendments, as President Johnson explained when he signed the bill, is to provide for the

9/ It is also to be noted that the Senate Report recites that the purpose of the entire Act was to lay down the minimum requirements of "fair administrative procedure." It can hardly be contended that a procedure which recognizes the right of the government to enforce a subpoena which it needs, while denying the same right to a private litigant, is "fair." See Inland Steel Co. v. NLRB, 109 F.2d 9, at p. 18-28 (9th Cir. 1940). See also the discussion, infra at p. 20 .

disclosure of information in the hands of government agencies. He said " . . . freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted." (Pike and Fischer, Administrative Law Desk Book, P. Stat-208).

The amendments provide that an agency must publish general information concerning its operation, including statements of its formal and informal procedures, statements of policy, and rules and regulations, and must make available to the public, upon request, copies of opinions and other materials (5 U.S.C. 552(a)(1) and (2)). It is also provided that an agency must produce, upon request, "identifiable records" in its possession. If an agency declines to produce such records, then "on complaint," a United States district court would have jurisdiction to enter an order compelling production (5 U.S.C. 552 (a)(3)).

The enactment of these amendments reflects a strong congressional policy in favor of the disclosure of information in the possession of the government. A broad interpretation of Section 11(2), as applied to the facts of this case, would be fully consistent with this policy.

4. The Board has frequently argued for a broad interpretation of the subpoena enforcement provisions of Section 11(2)

The appellant's contention that Section 11(2) should be strictly or literally interpreted is inconsistent with arguments made by the Board (through its General Counsel) in other cases. The Board has often argued for a broad interpretation of Section 11, and its arguments have been successful.

In NLRB v. Duval Jewelry Co., 357 U.S. 1 , 78 S. Ct. 1024 (1958), it was held, at the Board's urging, that the sentence in Section 11(1) which states that upon request the Board shall revoke a subpoena duces tecum if, in its opinion, the statutory requirements are not satisfied, would be broadly construed to permit the Board to delegate its powers to a regional director or hearing officer. See also Lewis v. NLRB, 357 U.S. 10, 78 S. Ct. 1029 (1958).

In NLRB v. International Typographical Union, 76, F. Supp. 895, 21 LRRM 2483 (D.C. S.D. N.Y. 1948), a subpoena duces tecum was issued to the president of the respondent union. He refused to comply with the subpoena, and the General Counsel then brought an application to enforce in the name of the Board. The application was signed and verified by the General Counsel. It was argued, on a motion to dismiss the enforcement proceeding, that Section 11(2), literally interpreted, requires that enforcement can be obtained only "upon application by the Board" and that, to the extent that the Board's rules authorized the General Counsel to initiate enforcement proceedings, such rules were invalid. The district court rejected the literal approach and held that the Board's authority to institute an enforcement proceeding could be delegated to the General Counsel.

In a brief recently filed with this Court in British Auto Parts, Inc. v. N.L.R.B., Docket No. 21, 883, the General Counsel points out that Section 11 has been "broadly construed" by the courts in the interest of permitting the Board to obtain

information needed in the performance of its duties (brief, p. 22).10/

5. A broad interpretation of Section 11(2) avoids a constitutional question. Unless appellees can seek district court assistance in enforcing the Wilmot subpoena, they would be denied "equal protection of law."

An interpretation of a statute which avoid a constitutional issue is favored. United States v. Congress of Industrial Organizations, 335 U.S. 106, at p. 120-121 68 S. Ct. 1349 (1948); United States v. Hanis, 347 U.S. 612, at p. 618, 74 S. Ct. 808 (1954), as stated in American Communications Assoc. v. Douds, 339 U.S. 382, 70 S. Ct. 674 (1950):

> "It is within the power and the duty of this Court to construe a statute so as to avoid the danger of unconstitutionately if it may be done in consonance with the legislative purpose." (at p. 407)

If, in this case, Section 11(2) is interpreted to give the district court jurisdiction only on a petition by the Board, a question of "due process of law" arises. The due process protection available to a litigant in a proceeding initiated by a federal agency derives from the 5th amendment and includes protection against unjustifiable statutory discrimination. Such protection is comparable to that given by the "equal protection" clause of the 14th amendment. As observed by the Supreme Court, "...the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." Bolling v. Sharpe, 347 U.S. 497, at p. 499, 74 S. Ct.

10/ The brief filed by General Counsel in British Auto Parts is also pertinent to a discussion of 28 U.S.C. 133 See infra, p. 26 .

693 (1954). See also Dawson v. Mayor and City Council of Baltimore City 220 F.2d 386 (4th Cir. 1955); Hansen v. Union Pac. R. Co., 71 N.W. 2d 526 (Neb. 1955)).

Equal protection of the law implies that "all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination." Republic Pictures Corp. v. Kappler, 151 F. 2d 543 (8th Cir. 1945), affirmed per curiam 327 U. S. 757, 66 S. Ct. 523 (1946).

It is true, as appellant asserts in his brief (p. 12-13), that Sections 10(e) and (f) of the Act (29 U.S.C. 160(e) and (f) contain an appeal procedure available to the appellees, but a close examination of that procedure reveals that it does not provide an adequate remedy, considering the circumstances, nor is it equal in any degree to the remedy available to the government, in a like situation. Consider the following comparison:

Remedy Followed By General Counsel

> If a witness subpoened by General Counsel refuses to testify, General Counsel would immediately petition the nearest district court for enforcement pursuant to Section 11(2). Assuming that the court enforced the subpoena, and thus caused the recalcitant witness to testify, the delay in the unfair labor practice case hearing could be measured in days, and the cost to the parties would be minimal. Even if the witness took an appeal to a United States Court of Appeals, the delay would not be undue. Some circuits would expedite such an appeal. "Because it is important that the adjourned unfair labor practice proceeding be resumed as soon as possible we have expedited the appel." N.L.R.B. v. Friedman, 352 F.2d 545, 60 L.R.R.M. 2258 (3rd Cir. 1965).

Remedy Suggested For Appellees

If a Section 11(2) proceeding is not available to appellees, and they are relegated to a Section 10(f) appeal, the course of events would be something like this.

Step 1. The Trial Examiner would proceed with the hearing, without the benefit of Wilmot's testimony sought by appellees. See N.L.R.B. St. of Proc. 101.10.

Step 2. Following the hearing the Trial Examiner would prepare a decision. Assuming that the Wilmot testimony was critical to appellees defense, the Examiner might conclude, in the absence of such evidence, that the appellees are guilty of the unfair labor practices as charged. See NLRB St. of Proc. 101.11(a).

It takes an average of 114 days for Examiners to prepare reports following the close of a hearing.[11/]

Step 3. The appellees would file exceptions to the Trial Examiner's decision with the full Board. See NLRB St. of Proc. 101.11(b)

Step 4. The Board would issue a decision and order. Assuming that the Board would stand behind its previous action in revoking the subpoena, it is likely that the Board would affirm the Trial Examiner. See NLRB St. of Proc. 101.12.

It takes an average of 105 for the Board to render a decision following the issuance of a Trail Examiner's opinion. [12/]

Step 5. The appellees would appeal to the Court of Appeals. See Act, Sec. 10(f).

Step 6. The Court of Appeals would issue a decision. It the Court of Appeals determined that the

1/ See testimony of General Counsel Ordman before House Special Labor Subcommittee, February 9, 1966, reported in BNA Labor Relations Yearbook 1966, p. 339-340.

2/ See previous footnote.

subpoenaed evidence was relevant and necessary to the proceeding, the Court would remand the case to the Board with instructions to take such testimony.

Step 7. On remand, the subpoenaed testimony would be presented, the Trial Examiner would write a new decision, taking such testimony into account. If the new decision were unsatisfactory to any party, the chain of appeal procedures outlined above would start over.

As noted above, it would take 114 days for the initial Trial Examiner's opinion and 105 days beyond that to obtain a Board opinion. We can cite no statistics concerning the time necessary to obtain a decision of the Court of Appeals, but an estimate of 180 days might be appropriate.

Thus the "remedy" available to appellees would consume more than 399 days and require the incurring of attorneys' fees and printing cost running into thousands of dollars.

It is clear, from these examples, that if the appellees are relegated to the normal appeal procedures in order to obtain the enforcement of their subpoena, while General Counsel, in a like situtation, could promptly seek recourse in a district court proceeding, the appellees have been denied equal protection of the law.

6. Conclusion

For all the reasons stated in this section of the brief, appellees urge that Section 11(2) be given a broad construction and that it be held that the District Court had jurisdiction, under Section 11(2), to enforce the Wilmot subpoena upon application by the appellees.

C. Jurisdiction Exists by Reason of 28 U.S.C. 1337

An independent basis for the exercise of jurisdiction by the District Court is Section 1337 of the Judicial Code, reading as follows:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Commerce regulating commerce or protecting trade and commerce against restraints and monopolicies." (28 U.S.C. 1337).

In Capital Service, Inc. et al v. N.L.R.B., 347 U.S. 501, 74 S. Ct. 699 (1954) the Court held that Section 1337 gives a district court jurisdiction in civil actions or proceedings under the National Labor Relations Act. The Supreme Court said:

> "The District Court had jurisdiction of the subject matter, because this is a 'civil action or proceeding' arising under an Act of Congress 'regulating commerce.' 28 U.S.C. Sec. 1337. The National Labor Relations Act is a law 'regulating commerce' (National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 14, 57 S. Ct. 615, 81 L. Ed 893)." at p. 504.

Where there are no available remedies under the specific terms of the Act or where those remedies are not adequate to protect statutory and constitutional rights, the equity power of the United States district courts has been invoked under 28 U.S.C. 1337. The Board itself has successfully invoked the jurisdiction of district courts in such circumstances, i.e., Capital Service, supra; N.L.R.B. v. New York Labor Relations Board, 106 F.Supp. 749 (D.C. S.D. N.Y. 1952); and Farmer v. United Electrical Workers, 211 F.2d 36 (D.C. Cir. 1954), as have private parties involved in Board proceedings, Camp v. Herzog, 104 F. Supp. 134

(D.C. D.C. 1952); Leedom v. Kyne, 358 U.S. 184 (1958); Deering Milliken, Inc. v. Johnston, 193 F. Supp. 741 (D.C. N.C. 1961); Local Union No. 112 Allied Industrial Workers v. Rothman, 209 F. Supp. 295 (1962;

It is true, as appellant asserts, that the exercise of jurisdiction under Section 1337 has been denied, in many instances, because the court has determined that suitable remedies are available under the Act. However, we have demonstrated, in the earlier portion of this brief, that there is no adequate remedy available to appellees under the terms of the Act.

It is also relevant that in approaching the District Court we did not seek to overturn a Board ruling or decision, as was the case in Boire v. Greyhound Corp., 376 U.S. 473 (1964) and in the other cases cited by appellant. We sought the assistance of the District Court solely to compel Wilmot's testimony in the hearing then proceeding before the Trial Examiner. The exercise of District Court jurisdiction, in this instance, would facilitate, not frustrate, the administrative process.

A case which involved the power of a district court to enforce a subpoena, under Section 1337, is United States v. Feaster, 330 F.2d 671 (5th Cir. 1964). In that case, the National Mediation Board asked for court enforcement of a subpoena it had issued to the Alabama State Docks Department in connection with a representation proceeding under the Railway Labor Act. There was no provision in the Act providing for the enforcements of subpoenas. It was held that the district court "has the power" to grant the requested relief. See also, United States v. Feaster

376 F.2d 147 (5th Cir. 1967).

Appellant would undoubtedly distinguish Feaster by emphasizing that there was no specific subpoena enforcement provision in that case, whereas here we have Section 11(2). In his brief, appellant argues "Since by the terms of a specific law only the Board is empowered to petition the courts for enforcement of its subpoenas, the general grant of jurisdication established by Section 1337 cannot be relied upon to accomplish the same result at the request of a private party." (brief p. 15)

Appellant assumes too much. Nothing in Section 11 (2) states that it constitutes the only enforcement procedure in connection with Board hearings and investigations, nor is there any sound reason (and appellant suggests none) why it should be so interpreted.

That Section 11 (2) does not constitute an exclusive remedy concerning the enforcement of Board subpoenas was fully acknowledged by the General Counsel in N.L.R.B. v. British Auto Parts Inc. ____F.Supp._____, 64 LRRM 2786 (D.C. C.D Calif. 1967). In this case General Counsel was seeking the enforcement of a subpoena directing an employer to produce, for purposes of a representation proceeding, a list of the names and addresses of its employees. The employer challenged the jurisdiction of the court, arguing that the list did not constitute "evidence" as that term is used in Section 11(1) and, therefore, the subpoena could not be enforced by a district court under the provisions of Section 11(2). In response, General Counsel argued that even if Section 11(2) were not available, the district court had the necessary

jurisdiction to enforce the subpoena under 28 U.S.C. 1337. The district court accepted this contention and ruled:

> "Even if the addresses of the employees are not considered to be 'evidence' within the meaning of Section 11 (1) of the Act, the Court would issue an injunction directly enforcing the Board's Excelsior rule. District Courts have jurisdiction under 28 U.S.C. Sec. 1337, "of all suits and proceedings regulating commerce." This statutory provision vests the district courts with jurisdiction to aid administrative agencies in carrying out their Congressionally authorized powers and duties, despite the absence of any express grant of district court jurisdiction under the agencies respective enabling acts." (citing cases)

British Auto Parts is now on appeal to this Court (Docket No. 21, 883) and the brief filed by General Counsel contains several pages devoted to the proposition that the district court had jurisdiction under Section 1337. (General Counsel's brief pp.29-35). The arguments and citations contained in that brief (including heavy reliance upon United States v. Feaster, supra) fully support appellees position here, and we adopt such arguments and citations by this reference.

If district court equity powers are available to General Counsel, under 28 U.S.C. 1337, in a situation where General Counsel is unable to proceed to enforce a subpoena under Section 11(2), so also, in the instant case, such powers are available to appellees in their effort to enforce the Wilmot subpoena.

D. Jurisdiction Exists By Reason Of 28 U.S.C. 1361

28 U.S.C. 1361 gives district courts original jurisdiction of actions "in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the plaintiff." In Knoll Associates Inc. v. Dixon, 232 F. Supp 283 (D.C. N.Y. 1964) the plaintiff claimed that the hearing examiner in a Federal Trade Commission hearing erred in refusing to call Commission attorneys to testify concerning their complicity in an alleged unauthorized removal of certain documents. Plaintiff claimed the hearing examiner also erred in denying plaintiff's motion for the production of documents in the files of the Commission relating to the Commission's communications with a witness with which such attorneys allegedly "cooperated." The court said:

> "Certainly it is clear that if, in the course of the proceedings before the Hearing Examiner, any of plaintiff's constitutional rights were disregarded, or if a substantial unfairness were accorded plaintiff there so that a fair and impartial hearing was denied it, or the proceedings were tantamount to an unwarranted trespass upon its rights, this Court should not hesitate to step in. Under 28 U.S.C. Sec. 1361, the Court has jurisdiction to compel the performance of a duty, and this goes for beyond ministerial duties, for fundamental trial rights are not immaterial." p.285

Since the notable statute of Elizabeth in 1562-63 the duty to attend a court hearing after proper service has been expressly recognized at common law and, 100 years earlier, such duty was recognized in Chancery: 8 Wigmore, Evidence Sec. 2190 footnotes 17 & 19; as Wigmore states, in Section 2192. "For more than three centuries it has now been recognized as a

fundamental maxim that the public (in the words sanctioned by Lord Hardewiche) has a right to every man's evidence." In United States v. Bryan, 339 U.S. 323 (1950), at p.331, the Court spoke of the duty of a subpoened witness to testify, stating that "every person within the jurisdiction of the Government is bound to perform (such duty) when properly summoned."

Wilmot as a public employee and attorney would appear to have even a greater duty to society than other witnesses. Nevertheless, Wilmot refused to testify and produce evidence in accordance with a properly issued subpoena, duly enforced by order of the Trial Examiner. The District Court has jurisdiction under 28 U.S.C. 1361 to compel the testimony of Wilmot in order to alleviate the substantial unfairness which would otherwise result.

Cases cited by appellant (brief p.15-16) are inapplicable to the facts of the instant case for the reason that the plaintiffs therein attempted to invoke Section 1361 to compel the exercise of a discretionary authority or conduct. In the present case the district court was merely requested to compel and enforce testimony, and the production of settlement agreements, concerning which no discutionary authority or conduct was involved.

## III. THE GENERAL COUNSEL IS NOT AN INDISPENSABLE PARTY.

Appellant cites Williams, et al, v. Fanning, 332 U.S. 490, 68 S. Ct. 188 (1947), for the proposition that the General Counsel is an indispensable party. To the contrary, Williams reversed the circuit court and district court decisions that

held the Postmaster General was an indispensable party. In Williams, the Postmaster General issued a fraud order directing Postmaster Fanning to refuse payment of any money order payable to Williams, to stamp "fraudulent" on all of Williams' mail and to return all mail to the senders. The Supreme Court noted and commented on the existing conflict among the circuits:

> . . . a conflict among the circuits developed in these postal fraud cases. National Conference on Legalizing Lotteries v. Goldman (CCA2d NY) 85 F2d 66, which held that the Postmaster General must be made a party, suggested that if he were not, the local postmaster would be left under a command of his superior to do what the court has forbidden. But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even thought the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp "fraudulent" on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing -- he need not be required to take new action either directly as in the Smith and Fall Cases or indirectly through his subordinate as in the Rutter Case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command." p. 493

Comparing the facts of the instant case with Williams, we find that Wilmot, like Postmaster Fanning, had received a direct order from his superior, General Counsel, i.e., "to refuse to testify." (Tr. 14) Similarly, the relief requested will expend itself on the subordinante official, Wilmot, as was the case with Postmaster Fanning. In both instances the subordinate

official is left under the command of his superior to do what the court has forbidden. However, the Supreme Court has held this fact to be immaterial. Clearly, the requested conduct of Postmaster Fanning, approved by the Supreme Court in Williams, is no different than the conduct required of Wilmot by the Court below.

Appellant cites three additional cases which are inapposite to the facts of this case. Vapor Blast Independent Shopworkers' Ass'n v. Simon, 305 F.2d 717 (7th Cir. 1962) held that the National Labor Relations Board members were indispensable parties. This case is inapposite for the reason that the Board is charged with enforcement of its own orders and the court would not entertain by way of mandus enforcement save as presented by the Board.

Likewise in Dombrovskis v. Esperdy, 321 F.2d 463 (2nd Cir. 1963) the Court found that the Secretary of State was an indispensable party, where the authority to issue visas was lodged in the Department of State. The Court states. "since appellee has no power to grant the relief sought by appellants, issuance of a decree against the appellee would be a useless act."

Finally, in Harris v. Smedile, 320 F.2d 661 (7th Cir. 962) the Court was requested to order the District Engineer to ancel a permit for construction off a lakeshore. The Court held hat the Secretary of the Army had exclusive jurisdiction to do hat the district court was asked to force the District Engineer o do. Moreover, the Department had, by regulation, expressly

provided that the District Engineer was "without authority to cansel or revoke permits."

In somewhat similar situations, National Labor Relations Board members have not been considered indispensable parties. Significantly, the basis for these decisions is the difficulty of joining Board members, fundamental fairness to the parties and the policy of the National Labor Laws to reduce and mitigate labor disputes. Brotherhood and Union of Transit Employees of Baltimore v. Madden, Regional Director, 58 F. Supp. 366 (D.C. M.D. 1944); Deering-Milliken, Inc. v. Johnston, 193 F. Supp. 741, 744, (D.C. N.C. 1961); See also, W. I. Dillner Transfer Co. v. McAndrew, 226 F. Supp. 860, 862-3, (D.C. Pa. 1963).

In summarizing the cases cited, Williams v. Fanning is clearly controlling but not in the manner suggested by appellent herein. To the contrary, Williams reversed the proposition which appellant suggests is controlling by holding that the Postmaster General was not an indispensable party. In the additional cases cited by the appellant, an indispensable party was found for the reason that the defendant before the court did not have the abil-ity or power to effectuate the relief desired. In the present case, Wilmot has the ability and power to testify and produce documents in response to a subpoena duly issued by the Regional Director. Clearly the relief requested will expend itself on the subordinate official without further action being required by the General Counsel. For the reasons stated the General Counsel is not an indispensable party.

IV THE SUBPOENA DUCES TECUM WAS ENFORCEABLE

In the brief filed by Wilmot, in his individual capacity, it is argued (at p. 16-19) that, on the merits, the Trial Examiner erred in refusing to revoke the subpoena and, hence, the district court erred in enforcing the subpoena.

It is said that Wilmot's testimony was not needed because appellees have in their possession copies of the signed settlement agreements. This is not the case. The copies which were furnished to appellees, at the time, were not signed. Subsequently, Wilmot advised that the charging parties (i.e., those who initiated the unfair labor practice proceeding) had signed the original copies. These original copies are in his possession and it is these copies which appellees seek to have him produce. The purpose is to show that the charging parties were parties to the settlement and that, by their signatures they like the appellees, considered that the charges were fully and finally resolved.

It is also contended that any testimony and evidence concerning the settlement agreements would be irrelevant in light of N.L.R.B. v. Campbell Soup Company, 278 F. 2d 259 (9th Cir. 1967) wherein it was held that the Board could require that settlement agreements be considered effective only when signed by a Regional Director. This argument begs the issue. The Trial Examiner can hardly determine whether Campbell Soup, bars a consideration of the settlement agreements in this case until all the facts and circumstances concerning their agreement, and their negotiation, are disclosed.

It is appellees' position that when all the facts are disclosed, Campbell Soup will be found to be inapplicable and, further, that any requirement for the signing of settlement agreements by the Regional Director was effectively waived, in this case, when the Acting Regional Director specifically approved the agreements by long distance telephone.

The Trial Examiner did not abuse his discretion by denying the motion to revoke the Wilmot subpoena and the District Court did not abuse its discretion in enforcing the subpoena.

## CONCLUSION

In N.L.R.B. v. Kingston Traps Rock Co., 222 F.2d 299, 36 L.R.R.M. 2106 (3rd Cir. 1955), the court characterized the conduct of an employer, who was attempting to avoid complying with a subpoena duces tecum issued at the request of the General Counsel, as "patently dilatory and obstructive and totally unjustifiable." These are strong words but they are applicable here.

The conduct of Wilmot in flatly refusing to testify in this matter, because of instructions from the General Counsel based on a non-disclosure rule which this Court, and others, have on numerous occasions held to be inapplicable in the absence of a genuine assertion of privilege, is "patently dilatory and obstructive and totally unjustifiable." The District Court possessed the necessary jurisdiction to compel Wilmot's testimony. The exercise of that jurisdiction should be affirmed and the

the case remanded for further proceedings.

Respectfully submitted,

Richard P. Donaldson, Esq.
James Hubbard, Esq.
Bassett, Donaldson & Hafer
2819 First Avenue
Seattle, Washington
Attorneys for Appellee
Teamsters Local 959

D. A. Burr, Esq.
Burr, Boney & Pease
825 W. Eighth Avenue
Anchorage, Alaska
Attorneys for Appellee
Grocers Wholesale, Inc.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

_____

James Hubbard
Attorney for Appellee
Teamsters Local 959